Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–57–93
LAMIN PCA, ANUAR CJ (MALAYA) AND GOPAL SRI RAM JCA
25 NOVEMBER 1996

Administrative Law — *Exercise of judicial functions — Judicial review — Application to quash award of Industrial Court — Objective examination of facts to ascertain whether a reasonable tribunal would have come to the like conclusion — Whether appellate judge exceeded his role in judicial review proceedings*

Labour Law — *Employment — Termination of employment — Dismissal — Allegation that employee was dismissed without just cause — Industrial Court dismissed employee's claim — Whether judge erred in quashing award of Industrial Court*

Civil Procedure — *Jurisdiction — Consequential relief — Award of Industrial Court quashed — Whether appellate court had jurisdiction and power to substitute order of remission with an award of fair and reasonable compensation*

Administrative Law — *Remedies — Certiorari — Consequential relief — Award of Industrial Court quashed — Whether appellate court had jurisdiction and power to substitute order of remission with an award of fair and reasonable compensation*

The appellant was a wholly-owned subsidiary of the State Economic Development Corporation of Selangor. It owned and managed several businesses, among others a recreational club called Kelab Darul Ehsan ('the club'). On 24 August 1985, the respondent commenced his employment with the appellant and was subsequently appointed first as the assistant manager of the club and later as its food and beverage ('F & B') director. On 13 November 1987, the chief executive of the club informed the respondent that the post of F & B director at the club would be abolished. The club was however prepared to appoint the respondent as the F & B manager with a 37% deduction in salary. The respondent was not minded to accept this offer as stated in his letter to the club dated 14 November 1987. There was however a misunderstanding in the correspondence between the parties with the end result that the appellant retrenched the respondent. The respondent made representations to the Director-General of Industrial Relations. The Director-General subsequently reported the matter to the Minister who referred the respondent's representations to the Industrial Court. The respondent claimed that he had been terminated from employment without just cause. The appellant sought to justify the respondent's termination on the ground that the post held by him had been abolished in consequence of a reorganization and rationalization of management postitions within the appellant's group of companies. The Industrial Court dismissed the respondent's claim. The respondent however subsequently moved the High Court for certiorari and had the award quashed. The High Court also issued mandamus directing the Industrial Court to re-adjudicate the dispute. The appellant appealed

against the decision of the High Court, contending that: (i) the learned judge exceeded his role in judicial review proceedings and actually exercised appellate jurisdiction when he quashed the award; and (ii) even if the learned judge kept well within the limits of the jurisdiction function, he was nevertheless wrong in the conclusions he arrived at. A further issue raised by the court was whether the court had jurisdiction and power to substitute the order of remission with an award of fair and reasonable compensation.

Held, dismissing the appeal:

(1) The learned judge was entirely aware of the nature of the jurisdiction he was called upon to exercise. An examination of the merits of a decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of the decision that ought to have been made in the first place, would not occasion an abuse of judicial power by an unjustified or unauthorized assumption of appellate power in certiorari proceedings.

There may, however, be cases in which, for reasons of public policy, national interest, public safety or national security, it may be wholly inappropriate for the courts to attempt any substitution of views. The present case, however, did not fall within any of these exceptions. The learned judge was therefore entitled to carry out an objective examination of the factual matrix presented to the Industrial Court to ascertain whether a reasonable tribunal similarly circumstanced would have come to the like conclusion (see p 799C–E, F–G); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 followed.

(2) The learned judge came to the right decision in finding that: (i) the doctrine of estoppel was not to be applied in industrial adjudication; (ii) the Industrial Court was wrong in upholding the respondent's termination on a ground not advanced by the appellant; and (iii) not only did the appellant fail to allege that there were losses, it singularly failed to lead any evidence in support of its claim that the post previously held by the respondent had been abolished. There was no error therefore in issuing the certiorari and in quashing the award of the Industrial Court (see pp 800G–I and 801H–I); *Nadarajah & Anor v Golf Resort (M) Sdn Bhd* [1992] 1 MLJ 506, *Tamil Nesan (M) Sdn Bhd v K Ganesan* (unreported), *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 followed.

(3) The Federal Court has the jurisdiction and the power to grant relief to the respondent. In this case, however, since reinstatement was not the proper remedy, the respondent was granted compensation (see pp 804I, 806F–G and 807D–E); *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, *R Rama Chandran v The Industrial Court of Malaysia & Anor*

A [1997] 1 MLJ 145 and *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors* [1996] 3 MLJ 489 followed.

[Bahasa Malaysia summary

Perayu merupakan sebuah subsidiari yang dimiliki sepenuhnya oleh Perbadanan Kemajuan Negeri Selangor. Ia memiliki dan menguruskan beberapa buah perniagaan, di antaranya sebuah kelab rekreasi bernama Kelab Darul Ehsan ('kelab tersebut'). Pada 24 Ogos 1985, penentang telah mula bekerja dengan perayu dan kemudian dilantik pertamanya sebagai penolong pengurus kelab tersebut dan kemudiannya sebagai pengarah makanan dan minuman ('M & M'). Pada 13 November 1987, ketua eksekutif kelab tersebut memberitahu penentang bahawa jawatan pengarah M & M di kelab tersebut akan dihapuskan. Walau bagaimana pun, kelab tersebut bersedia melantik penentang sebagai pengurus M & M dengan potongan gaji sebanyak 37%. Penentang tidak keberatan menerima tawaran ini seperti yang dinyatakan dalam suratnya kepada kelab tersebut yang bertarikh 14 November 1987. Namun demikian, terdapat perselisihan faham dalam surat-menyurat antara pihak-pihak dengan keputusan perayu memberhentikan penentang. Penentang telah membuat representasi kepada Ketua Pengarah Perhubungan Perusahaan. Ketua Pengarah kemudiannya melaporkan perkara tersebut kepada Menteri, yang merujuk representasi penentang kepada Mahkamah Perusahaan. Penentang menuntut bahawa dia telah diberhentikan daripada pekerjaannya tanpa sebab yang munasabah. Perayu telah cuba memberi justifikasi kepada pemberhentian penentang atas alasan bahawa jawatan yang dipegangnya telah dihapuskan akibat penyusunan semula dan perasionalan jawatan-jawatan pengurusan dalam kumpulan syarikat perayu. Mahkamah Perusahaan telah menolak tuntutan penentang. Walau bagaimana pun, penentang kemudiannya telah memohon kepada Mahkamah Tinggi untuk certiorari dan award tersebut telah dibatalkan. Mahkamah Tinggi juga telah mengeluarkan mandamus yang mengarahkan Mahkamah Perusahaan supaya mendengar semula pertikaian itu. Perayu telah merayu terhadap keputusan Mahkamah Tinggi, dengan berhujah bahawa: (i) hakim yang arif telah melampaui peranannya dalam prosiding kajian semula kehakiman dan sebenarnya telah melaksanakan bidang kuasa rayuan apabila beliau membatalkan award tersebut; dan (ii) jika pun hakim yang arif telah membuat keputusan dalam had fungsi bidang kuasa, beliau adalah salah dalam kesimpulan yang dicapainya. Isu seterusnya yang dibangkitkan oleh mahkamah adalah sama ada mahkamah mempunyai bidang kuasa dan kuasa untuk menggantikan perintah remitan dengan suatu award pampasan yang adil dan munasabah.

Diputuskan, menolak rayuan:

(1) Hakim yang arif sedar sepenuhnya akan sifat bidang kuasa yang harus dilaksanakan. Pemeriksaan merit sesuatu keputusan disusuli dengan suatu keputusan di mana tiada orang atau badan yang munasabah dalam keadaan yang sama akan mencapai keputusan

berkenaan dan pembuatan keputusan yang sepatutnya telah dibuat dari mulanya, tidak akan menyebabkan suatu penyalahgunaan kuasa kehakiman melalui perebutan kuasa rayuan dalam prosiding certiorari yang tidak berjustifikasi atau yang tidak diberi kuasa.

Namun demikian, mungkin terdapatnya kes dalam mana, atas alasan polisi awam, kepentingan negara, keselamatan awam atau keselamatan negara, adalah tidak wajar pada keseluruhannya bagi mahkamah untuk cuba mengganti pandangan. Walau bagaimanapun, kes ini tidak termasuk dalam mana-mana kekecualian ini. Oleh itu, hakim yang arif berhak melaksanakan pemeriksaan objektif ke atas matriks fakta yang dikemukakan kepada Mahkamah Perusahaan bagi menentukan sama ada sebuah tribunal yang munasabah dalam keadaan yang sama akan mencapai kesimpulan yang sama (lihat ms 799C–E, F–G); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 diikut.

(2) Hakim yang arif telah membuat keputusan yang betul dalam memutuskan bahawa: (i) doktrin estoppel tidak terpakai dalam penghukuman perusahaan; (ii) Mahkamah Perusahaan adalah salah dalam membenarkan pemberhentian penentang atas suatu alasan yang tidak dikemukakan oleh perayu; dan (iii) perayu bukan sahaja telah gagal mengatakan bahawa terdapatnya kerugian, ianya juga telah gagal mengemukakan keterangan untuk menyokong tuntutannya bahawa jawatan yang telah dipegang sebelum ini oleh penentang telah dihapuskan. Oleh itu, tiada kesilapan dalam mengeluarkan certiorari dan dalam membatalkan award Mahkamah Perusahaan (lihat ms 800G–I dan 801H–I); *Nadarajah & Anor v Golf Resort (M) Sdn Bhd* [1992] 1 MLJ 506, *Tamil Nesan (M) Sdn Bhd v K Ganesan* (tidak dilaporkan), *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 dan *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 diikut.

(3) Mahkamah Persekutuan mempunyai bidang kuasa dan kuasa untuk memberikan relief kepada penentang. Walau bagaimanapun, dalam kes ini, oleh kerana pengembalian kedudukan jawatan bukanlah remedi yang wajar, penentang diberikan pampasan (lihat ms 804I, 806F–G dan 807D–E); *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 dan *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors* [1996] 3 MLJ 489 diikut.]

Notes

For cases on the exercise of judicial functions, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 51–70.

For cases on termination of employment, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 790–835.

A For cases on jurisdiction of the court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2092–2255.
For cases on jurisdiction on certiorari, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 96–227.

B **Cases referred to**

Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141 (refd)
Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374 (refd)
Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129 (follld)
C *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors* [1996] 3 MLJ 489 (follld)
Hendry v De Cruz [1949] MLJ (Supp) 25 (refd)
Hong Leong Equipments Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (follld)
D *Lee Lee Chen v Seow Peng Kwang* [1960] MLJ 1 (refd)
Nadarajah & Anor v Golf Resort (M) Sdn Bhd [1992] 1 MLJ 506 (follld)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (follld)
R v A-G, ex p Imperial Chemical Industries Plc (1986) 60 TC 1 (refd)
E *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (refd)
Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (follld)
Tamil Nesan (M) Sdn Bhd v K Ganesan (unreported) (follld)

F **Legislation referred to**

Courts of Judicature Act 1964 s 69(4), (5), Schedule para 1
Industrial Relations Act 1967 s 20(1)
Rules of the Federal Court 1995 r 138
Rules of the Supreme Court 1980 r 51(4), (5)
G Civil Procedure Code 1908 O 41 r 33 [India]

N Sivabalah (*Shearn Delamore & Co*) for the appellant.
P Kuppusamy (*Jagit Singh Gill* with him) (*P Kuppusamy & Co*) for the respondent.

H *Cur Adv Vult*

Gopal Sri Ram JCA (delivering the judgment of the court): This is an appeal against the decision of Abu Mansor J (now JCA) whereby he quashed an award of the Industrial Court that upheld the appellant's act
I of terminating the respondent's employment.

The facts relevant to this appeal are as follows.

The appellant is a wholly-owned subsidiary of the State Economic Development Corporation of Selangor. It owns and manages several

businesses. Amongst these were a hotel known as the Holiday Inn City Centre and a recreational club called 'Kelab Darul Ehsan' ('the club'). But now, it no longer owns nor manages the club.

On 24 August 1985, the respondent commenced his employment with the appellant. He was initially employed as the resident manager of the Holiday Inn City Centre. By a letter dated 25 September 1986, he was appointed as the assistant manager of the club with effect from 1 October 1986. Later, on 1 April 1987, one En Bistaman Siru Abdul Rahman was appointed as the club's general manager, while the respondent was almost simultaneously appointed as its food and beverage director. Later, one En Azman Shah replaced Bistaman as the chief executive of the club.

On 13 November 1987, Azman Shah sent for the respondent. There was a meeting between them, at which Azman Shah informed the respondent that he (Azman) had decided to abolish the post of food and beverage director. He was, however, prepared to appoint the respondent as the food and beverage manager with a 37% reduction in salary. The respondent was not minded to accept this offer and said so in his letter of 14 November 1987 which contained this penultimate paragraph:

> Since you are going to abolish my present position as food and beverage director, it is construed as a retrenchment. If this is so, I would expect a retrenchment benefit before I leave.

This entirely proper observation by the respondent was, as will be later seen, to have adverse consequences for him in the proceedings before the Industrial Court.

That the appellant misunderstood the respondent's stand comes across from the following paragraphs of its reply to him dated 23 November 1987:

> We refer to your letter dated 14 November 1987 *with regard to your intention to be retrenched* from Perangsang Recreation Bhd.
>
> 2 After due consideration and with much regret the Board *has agreed to your request to leave the company* with effect from 1 December 1987. (Emphasis added.)

Now, this was clearly wrong. It was not the respondent who was seeking retrenchment. On the other hand, it was the appellant who had — through Azman Shah — informed the respondent that the very post which the respondent held was being abolished.

Not unexpectedly therefore, the respondent refused to accept the position as described in the appellant's letter of 23 November 1987. His response came by his letter dated 30 November 1987 which, shorn of formalities, reads as follows:

> Your letter dated 23 November 1987 refers. I have no reason to accept your letter and have no intention of being retrenched without any apparent reason.
>
> I merely sought clarifications whether I am being demoted, terminated or retrenched.

> Since today is my last day with Kelab Darul Ehsan, I have instructed my solicitor to take my case and he will be in touch with you shortly.

The appellant thereafter paid to the respondent a sum of RM15,296.32 as retrenchment benefit, which sum the respondent — through his solicitors' letter dated 7 December 1987 — expressly accepted without prejudice to his rights in industrial law.

The respondent subsequently made representations to the Director General of Industrial Relations pursuant to the provisions of s 20(1) of the Industrial Relations Act 1967 ('the Act'). The Director General — having failed to effect a conciliation — reported the matter to the Minister who referred the respondent's representations to the Industrial Court.

In his statement of case filed in the Industrial Court, the respondent claimed that he had been terminated from employment without just cause. The appellant, in its statement in reply, disputed this. It sought to justify the respondent's termination on the ground that the post held by him had been abolished in consequence of a reorganization and rationalization of management positions within the appellant's group of companies. In consequence, the respondent's services had become redundant and he was therefore retrenched.

So much for the pleadings.

In the proceedings before the Industrial Court, the appellant did not lead any evidence at all in support of its contention that the post previously held by the respondent had been abolished. Despite this, it was argued by the appellant that its claim of redundancy had been proved. It was also argued that the respondent was estopped from claiming that he had been dismissed without just cause or excuse because of his acceptance of the retrenchment benefit. These submissions found favour with the Industrial Court which dismissed the respondent's claim.

In his award, the learned chairman dealt with the latter argument first. This is what he said:

> After having requested for a retrenchment benefit, being accepted by the company and the execution of the payment before he left the club, it is unconscionable, if not wrong, for the workman subsequently to come out with a statement that 'I accepted the amount' on a 'without prejudice' basis. After having received the payment, on the last day before he left the company, he handed exh J dated 30 November 1987 to CW1. The letter was in reply to exh G sent by the company to him. Therein the workman stated that, 'I have no reason to accept your letter and have no intention of being retrenched without any apparent reason'. Surprisingly enough, no mention was made in the letter about the sum of money received by him. I believe the money by then must have been paid as otherwise the letter would have mentioned that the money would not be accepted by him and the cheque would have been handed back to the company. He gave his reason for the delay in giving the reply to exh G as he was then discussing the matter with his solicitors. If the money had not been received by then, the solicitors would have advised him not to do so. Similarly, it is unconscionable, if not wrong, for the workman now to say that he received the money on a 'without prejudice' basis. To me it is an afterthought.

In regard to the first and more critical issue, the learned chairman said as follows:

> But fate had it that, which I am satisfied, *for good reason this post needed to be abolished, thereby making him redundant. From the evidence, I am satisfied that it is a scheme carried out by the company to reorganize owing to financial losses.* It is the right of the employer to reorganize his business in the way he likes for the purpose of the economy or convenience provided he acts bona fide. An employer has the right to determine the number of his employees consistent with his business or organization; and if by the implementation of such a reorganization scheme adopted for reasons of economy and better management of his business, the services of some of the employees were found to be in excess of the requirement of his business, the employer is entitled to discharge such excess. In such a case, an arbitration court will not intervene: Award No 237/87 [1987] 2 ILR 80. Was there bad faith on the part of the company that the services of the workman was terminated under the guise of redundancy? The workman felt that CW1 had a grudge against him over an incident earlier in the year of 1987 when he was holding the position of assistant general manager. CW1 was very angry with the club and accused him of pinching the staff from City Centre. Surprisingly enough, this issue was never brought up during the cross-examination of CW1. In any event, the purported incident took place earlier in the year and the termination of his services took place in late 1987; and in between the period, there was nothing at all to suggest that there was enmity between them. In the circumstances, I would not accept the contention by the workman as being the ground for the termination of his service as food and beverage director. (Emphasis added.)

The respondent, being dissatisfied with the findings of the Industrial Court, successfully moved the High Court for certiorari and had the award quashed. The High Court also issued mandamus directing the Industrial Court to re-adjudicate the dispute. The reasons for the learned judge's decision appear sufficiently from the following passages of the judgment:

> Learned counsel further submitted that the learned chairman misdirected himself in law just because the claimant received his retrenchment benefit, but it must be remembered it was on a 'without prejudice' basis. Since the date of the award, two High Court decisions had since cleared the air. In *Nadarajah & Anor v Golf Resort (M) Sdn Bhd* [1992] 1 MLJ 506, Eusoff Chin J (as he then was), on a submission of the claimant being estopped from claiming just because he had received his retrenchment benefit, held it is clear from s 30(5) of the Industrial Relations Act 1967 that technical rules such as estoppel, limitation or laches, etc — unless otherwise provided for in the Act — have no place and should not be invoked. The unreported case of *Tamil Nesan (M) Sdn Bhd v K Ganesan* also decided so on this point.
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> Learned applicant's counsel submitted that if the Industrial Court had had sight of these decisions, the verdict would certainly have been different.
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> On this point of perversity, I agree that the applicant had succeeded in convincing me that the Industrial Court's decision on this point was perverse and I make that finding on the face of the record.
>
> As to the claimant being redundant and so he was dismissed, in my considered view the Industrial Court had made an error. In the first place, such a plea as loss was never pleaded by the respondent. What in fact was

in evidence was that the company underwent reorganization and resulted in the claimant being redundant. Suffice to say that the Industrial Court made an error in its trying to find another reason for the claimant's dismissal, different from what was stated to be the reason by the respondent as a misdirection and an error in law. It is true to say that and I find it to be so that redundancy because of the abolishing of job function has not been made out.

In deciding whether the Industrial Court had made an error, I have considered the respondent's submission that this is not an appeal and what I must examine is not the decision but the decision-making process. I am unable to say, as submitted by the respondent's counsel, that in handing out its decision, the Industrial Court had not committed errors. I have considered the sum total of the respondent's submission and that of the applicant, and bearing in mind the evidence as a whole and the authorities shown to me, I have no hesitation in saying that the decision of the Industrial Court was perverse on the claimant's claim for retrenchment benefit and on the issue of redundancy.

Before us, Mr Sivabalah of counsel for the appellant attacked these findings by the learned judge on several grounds. We find it unnecessary to deal with all of them. Suffice that we address the two main criticisms he levelled against the approach adopted by the learned judge.

First, it was submitted that the learned judge exceeded his role in judicial review proceedings and actually exercised appellate jurisdiction when he quashed the award. Counsel relied on several leading decisions of the precursors of this court that establish the principle that in certiorari proceedings, the function of the court is one of review only, confined to the decision-making process and not to the merits of the decision itself. The principle is so well-settled that we find an examination of the authorities to be quite unnecessary.

However, it is quite apparent from the passages which we have quoted from the judgment that the learned judge was entirely aware of the nature of the jurisdiction he was called upon to exercise. It must be borne in mind that the principal ground of complaint advanced by the respondent before the learned judge was that the award was perverse. That is simply another way of saying that the award was one which no reasonable tribunal in the circumstances would have made. In public law, this proposition is known as '*Wednesbury* unreasonableness'; a shorthand form to summarize the Delphic pronouncement by Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. It is one of the well-recognized grounds upon which the decision of a public decision-maker may be challenged in the courts.

Until very recently, it was generally thought that when a decision is challenged on grounds of '*Wednesbury* unreasonableness', the court is confined to an examination of the decision-making process and not the merits of the decision itself. That is an error perpetuated by adherence to a narrow doctrinaire approach without analysing later judicial pronouncements that had addressed the subject. The fallacy of the doctrine that judicial review is always confined to the decision-making process and never with the merits of the decision itself was exploded by the landmark

decision of this court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145. A

Edgar Joseph Jr FCJ, who formed the majority, explained the true principle in language that merits recollection (at pp 186–187):

> It is often said that judicial review is concerned not with the decision but the decision-making process (see eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of *procedural impropriety*.
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> But, Lord Diplock's *other* grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for *process*, but also for *substance*.

In *Council of Civil Service Unions & Ors v Minister for the Civil Service*, Lord Diplock explained the expression 'irrationality' as follows (at p 410):

> By 'irrationality', I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

In *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at pp 143–144, Lord Hailsham expressed the traditional approach of English common law to the judicial review function as follows:

> Since the range of authorities and the circumstances of the use of their power are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. *There are passages in the judgment of Lord Denning MR (and perhaps in the other judgments of the Court of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts carte blanche to review the decision of the authority on the basis of what the courts themselves consider fair and reasonable on the merits.* I am not sure whether Lord Denning MR really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in the present case, the reasoning of the subordinate authority with a view to substituting its

A own opinion. If so, I do not think this is a correct statement of principle. *The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court.* (Emphasis added.)

B In our judgment, the correct approach to the '*Wednesbury* unreasonableness' and the proportionality tests is that adopted by Lord Denning MR in the Court of Appeal in *Evans*. We therefore find the criticism of his approach by the House to be unwarranted. The continued reluctance of English courts to come to grips with the practical realities of applying the '*Wednesbury* unreasonableness' test (see, for example, *R v Secretary of State for the Home* C *Department, ex p Brind* [1991] 1 AC 696) in no way deters us from accepting as correct the view expressed by Edgar Joseph Jr FCJ in *Rama Chandran*. An examination of the merits of a decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of the decision that ought to have been made in the first place, does not, in our view, occasion D an abuse of judicial power by an unjustified or unauthorized assumption of appellate power in certiorari proceedings.

Of course, there may be cases in which — for reasons of public policy, national interest, public safety or national security — it may be wholly inappropriate for the courts to attempt any substitution of views. E Unlike the executive, the judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations. Each case must be considered on its own facts and it would be quite unwise to attempt the formulation F of an all-embracing rule.

The present case does not fall within any of the exceptions we mentioned a moment ago. The learned judge was therefore entitled — indeed, he was under a duty — to carry out an objective examination of the factual matrix presented to the Industrial Court to ascertain whether a reasonable tribunal similarly circumstanced would have come to the like G conclusion. There was, therefore, no misdirection in law by the learned judge upon the basis of intervention and no transgression of the prescribed parameters of judicial review. For these reasons, we entertain no difficulty in rejecting the first submission advanced on the appellant's behalf.

That brings us to Mr Sivabalah's second and alternative submission. H The argument here is that even if the learned judge kept well within the limits of the judicial review function, he was nevertheless wrong in the conclusions he arrived at. It was submitted that a reasonable tribunal appraised of the facts would have come to the same conclusion as did the Industrial Court in the present case. These arguments call for an I examination of the material that was placed before the Industrial Court.

The first ground upon which the Industrial Court denied the respondent relief was his conduct in all the circumstances of the case, with particular regard to his acceptance of the redundancy payment from the appellant. As may be seen from those passages of the award which we have earlier reproduced, the learned chairman held that the respondent, by his

conduct in question, was precluded from claiming that he had been dismissed without just cause or excuse. A

The learned judge very properly treated this conclusion as being in substance a finding based on the doctrine of estoppel. He relied upon the decisions in *Nadarajah & Anor v Golf Resort (M) Sdn Bhd* [1992] 1 MLJ 506 and *Tamil Nesan (M) Sdn Bhd v K Ganesan* (unreported) as authority for the proposition that the doctrine of estoppel is not to be applied in industrial adjudication. B

In *Nadarajah*, Eusoff Chin J (now Chief Justice of the Federal Court) observed that the Industrial Court (at p 511):

> ... must act according to equity, good conscience and the substantial merits of the case *without regard* to technicalities and legal form. Technical rules such as estoppel, limitation, laches, acquiescence, etc (unless otherwise provided for in the Act) have no place in industrial adjudication and they should not be allowed to be invoked for defeating claims which are just and proper. C

In *Tamil Nesan*'s case, Mohd Yusof J (as he then was) applied with approval the following passage appearing at p 1591 in Vol 2 of the *Law of Industrial Disputes* (4th Ed) by Malhotra, a leading treatise on the subject: D

> *Estoppel and waiver*
>
> The technicalities of the procedural law, ie the Code of Civil Procedure or the Evidence Act, do not apply to industrial adjudication. But fundamental principles of procedural law cannot be given go-by whether called the rules of natural justice or by any other name. For instance, even if some workmen accept certain amount 'in full and final settlement of their account', they cannot be estopped from further claiming their legitimate dues nor can there be waiver in this respect of the rights accruing to them under the industrial law. The principle of estoppel or waiver cannot be rigorously applied against the workmen especially when it is not clear that they accept compensation given by the management in full satisfaction of their claim after having been made aware that they were entitled to higher compensation. E F

We entertain no difficulty in affirming, without qualification, the propositions established by the foregoing two decisions. The learned judge was entirely correct in applying them and in his observation that the Industrial Court had erred in law in coming to the conclusion it did upon the point under discussion. Since a public decision-maker has no jurisdiction to make an error of law (see *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317), the learned judge was entitled to hold that the Industrial Court had exceeded its jurisdiction in applying the doctrine of estoppel to the process of industrial adjudication. G H

The other ground on which the learned judge acted to quash the award in the instant case arose from the Industrial Court's finding that the respondent had been made redundant because of the losses suffered by the appellant. The learned judge's conclusion that the Industrial Court was wrong in upholding the respondent's termination on a ground not advanced by the appellant in its pleaded case is certainly supported by pronouncements made in two leading cases. I

A In *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 at p 136, Raja Azlan Shah CJ (Malaya) (as he then was) explained the role of the Industrial Court as well as the High Court on matters of proof in industrial adjudication:

> Where representations are made and are referred to the Industrial Court for
> B enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. *If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry*
> C *of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.*
>
> ...
>
> But on the finding that there was no redundancy as suggested by the company, the conclusion is inevitable that the termination was without the cause or excuse advanced and therefore without just cause or excuse.
> D
> We do not think that having regard to the company's pleadings in the Industrial Court, the High Court was correct to consider the ground of termination by due notice, which had not been relied on in the Industrial Court, but assuming that it is possible for it to do so since this question was raised in the statement in support of the application for certiorari, we are of
> E the opinion for the reasons given by this court in *Dr Dutt*'s case, that termination by due notice but without just cause or excuse is a dismissal in respect of which the Industrial Court can make an order for reinstatement or an award of compensation in lieu of reinstatement. (Emphasis added.)

In *R Rama Chandran v The Industrial Court of Malaysia & Anor*, Eusoff Chin Chief Justice put the matter beyond any doubt. He said (at p 178):

F

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinize the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s 30 of the Industrial Relations Act 1967) but
> G it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep
> H itself alert to the issues and attend to matters it is bound to consider.

In our judgment, the failure by the Industrial Court to adhere to these salutary principles amply supports the learned judge's conclusion. Quite apart from the reasons given by the learned judge, the answer to counsel's complaint lies, we think, in the observation made by the learned President
I of the Court of Appeal during argument. As pointed out by his Lordship, not only did the appellant fail to allege that there were losses, it singularly failed to lead any evidence in support of its claim that the post previously held by the respondent had been abolished. In this context, we need do no more than to quote the following passage appearing in *Dismissal, Discharge, Termination and Punishment* (10th Ed) by Malhotra Vol 1 at p 791:

> The order of retrenchment, therefore, should of course be left to the management and the decision of management that some are better qualified cannot be questioned by the tribunal unless it comes to the conclusion that the preferential treatment was mala fide If the preferential treatment given to juniors ignores the well-recognized principle of industrial law that 'last come, first go' without any acceptable or sound reasoning, the tribunal will be justified to hold that the action of the management was not bona fide.
>
> But the rule of 'last come, first go' could have obviously no application to the case of retrenchment of the only employee in a particular category of workmen because in such a case *it is retrenchment of the post itself*, and therefore, if for reasons of economy and any genuine interest of reorganization the services of a single employee of a category have to be dispensed with, there is no scope for the application of this principle. (Emphasis added.)

At the risk of repetition, we emphasize that here there was no proof that the respondent's post had been abolished. Nor, we may add, was there a specific finding by the Industrial Court that the post in question had been abolished. The material made available at all levels admits of only one reasonable inference, namely that the post was not abolished. It follows that not only did the Industrial Court find for the appellant on an unpleaded case, the appellant had itself failed to make out the justification relied upon by it. There was, therefore, no redundancy as alleged by the respondent. The inevitable conclusion we reach on the proved and undisputed facts is that the respondent was dismissed from his employment and that his dismissal was without just cause or excuse.

Having carefully considered the submissions of counsel for the appellant, we were left unconvinced that the learned judge had erred in issuing certiorari and in quashing the award of the Industrial Court. We therefore found it unnecessary to call upon counsel for the respondent for a reply. All that remained was to dismiss the appeal and determine the question whether the consequential order made by the learned judge remitting the matter to the Industrial Court should remain or whether it ought, in the circumstances of this case, to be substituted for some other more appropriate relief. And on this question we invited argument from Mr Sivabalah, who informed us that he had anticipated the question and was therefore prepared to deal with it.

The question that we specifically put to Mr Sivabalah was whether this court had the jurisdiction and the power to substitute the order of remission with an award of fair and reasonable compensation. We drew counsel's attention to the decision of this court in *Rama Chandran* and of the Court of Appeal in *Hong Leong Equipments Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 which, in our judgment, sufficiently answer the question in the affirmative.

Until the decision in these two cases, the view generally held was that the only course open to the High Court when it quashed an award of the Industrial Court was to remit the dispute to that court for re-adjudication. This was the result of slavish adherence to English precedent without any reference to our own written law, in particular, para 1 of the Schedule to the Courts of Judicature Act 1964. The narrow and restrictive approach

A that had hitherto prevailed was rightly cast aside by this court in *Rama Chandran*. Eusoff Chin Chief Justice, who led the majority, exposed the fallacy of the previous practice in the following passage in his judgment (at pp 184–185):

> The High Court's jurisdiction should not be curtailed or narrowed or
> B constricted by mere reference to the old historical development in which the writ of certiorari was developed and came to be granted by the courts in England. Of course if the application for certiorari is dismissed, that ends the matter. *But if the application is allowed, the court has surely to mould the order. If we were to merely grant certiorari to quash the award and nothing more, this will deprive the writ of its vital and effective meaning and may result in grave*
> C *injustice being caused to the claimant.*
>
> Having carefully considered the question, I am not persuaded by the submission of the learned counsel for the society that we should remit the case to the Industrial Court with a direction to make the necessary consequential orders. As far as possible, the anxiety and endeavour of the court should be to remedy an injustice when it is brought to its attention.
> D *On the facts of the case before us, to remit this matter back to the Industrial Court would mean to prolong the dispute which would hardly be fair or conducive to the interests of the parties. In the circumstances, justice demands that to avoid further delay and expense, we determine the consequential relief rather than remitting the case to the Industrial Court for that purpose.* (Emphasis added.)

E In *Hong Leong Equipment*, one of the judgments of the Court of Appeal recognized that (at pp 543–544):

> ... the power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has
> F imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may, of course, be guided by the decisions of courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our own written law when determining the nature and scope of their powers.
>
> G In my judgment, the wide power conferred by the language of para 1 of the Schedule enables our courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straitjacket. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant
> H such relief as meets the ends of justice.
>
> Let me illustrate. Assume for a moment that an award of the Industrial Court upholding the dismissal of a workman is quashed by certiorari. The ordinary course — and this is the course that would be taken by an English court — would be to remit the matter to the Industrial Court by way of
> I mandamus to compel it to rehear the case. But the resultant delay and the inevitable result in the workman's favour may well be compelling factors to justify the award of relief by the High Court.
>
> In a proper case, I envisage no impediment to the High Court making the appropriate determination and awarding fair compensation to the

> workman. In such cases, it is difficult to see what possible good could come out of prolonging the agony of the parties to the dispute by delaying the matter and adding to the cause list of an already overworked tribunal.

We have no hesitation in accepting that the above-quoted passages in these two cases accurately represent the law.

Counsel for the appellant, however, invited us to depart from the majority views expressed in *Rama Chandran* and to uphold the minority judgment of Wan Yahya FCJ. We must emphatically reject this invitation for two reasons.

First, although *Rama Chandran* was decided by a majority, it is nevertheless a decision of this court. Contrary to any view that may be held in any quarter, this court is bound by its own decisions, whether arrived at unanimously or by a majority. And the correctness of the decisions of this court may not be called into question save and except before a larger bench of this court specially convened by or upon the direction of the Chief Justice. It is therefore not open for one division of this court to reverse the decision of another division given in an earlier case. If a contrary situation be permitted, then no decision of the apex court will be safe as precedent and uncertainty in the law will prevail. For like reasons, the Court of Appeal is bound by its own decisions. See *Hendry v De Cruz* [1949] MLJ (Supp) 25.

In dealing with an argument such as that presented before us, it is useful to remind ourselves of the basic philosophy of our common law. That philosophy is housed in the expression 'certainty through precedent'. Its main object is to enable members of the public to organize their affairs in accordance with law and for legal advisers to advise their clients with fair accuracy about the state of the law in order to avoid wasteful and unnecessary litigation. A rule by which one division of this court is not to be bound by the decisions of another division will therefore undermine the very foundations upon which our common law rests and cannot therefore be countenanced.

Second, and more importantly, we accept that for the reasons set forth therein, the majority judgments in *Rama Chandran* are correct and that the minority judgment of Wan Yahya FCJ is wrong. To merely say that because a reasonable tribunal would have found the dismissal to have been unjust and leave the matter there without more is to abdicate the judicial review function entrusted to the superior courts by the Federal Constitution and Parliament.

As observed by Lord Oliver in *R v A-G, ex p Imperial Chemical Industries Plc* (1986) 60 TC 1 at p 64:

> [I]t does seem to me that it must be wrong in principle when a litigant has succeeded in making good his case and has done nothing to disentitle himself to relief, to deny him any remedy unless, at any rate, there are extremely strong reasons in public policy for doing so.

Having decided that we have jurisdiction to award relief, we now turn to the question whether we have the necessary power to do so in the present case. We make this distinction for the reason that a court, while having jurisdiction to grant a particular relief, may lack the power to do so.

Thus, in *Lee Lee Chen v Seow Peng Kwang* [1960] MLJ 1 at p 3 Thomson CJ said that:

> ... there is a distinction between the jurisdiction of a court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.

Although these words were spoken when interpreting the Courts Ordinance 1948, they are of general application to the judicial function and hold true in the context of the Courts of Judicature Act 1964.

Having given the matter due consideration, we are of the view that this court is seized of power to grant the respondent appropriate relief in this case.

We begin by reminding ourselves that this appeal was lodged before the creation of the Court of Appeal. It therefore stands to be dealt with in accordance with the Rules of the Supreme Court 1980 by reason of r 138 of the Rules of the Federal Court 1995, which reads as follows:

> The Rules of the Supreme Court 1980 is hereby repealed:
>
> Provided that any proceeding which is pending before the Supreme Court on 23 June 1994, shall be continued and concluded by the Federal Court under the Rules of the Supreme Court 1980.

Subrules (4) and (5) of r 51 of the Rules of the Supreme Court 1980 regulate the powers of this court in regard to the present appeal and they provide as follows:

> (4) The court may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appealed from or complained of the decision.

It is noteworthy that these two subrules are couched in language identical to s 69(4) and (5) of the Courts of Judicature Act 1964 respectively. The subsections now apply only to appeals to the Court of Appeal, there being no similar provision existing in respect of appeals to this court at present.

In *Rama Chandran*, this court allowed the appeal and made a finding that the appellant workman had been dismissed without just cause or excuse. It was therefore in a position to award him compensation in lieu of reinstatement. In the present case, however, we had decided to dismiss the appeal after concluding that the respondent had been unjustly dismissed. Does this difference affect the powers that we may exercise? We do not think that it does.

In *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors* [1996] 3 MLJ 489, the High Court — as in the present case — had

quashed an award of the Industrial Court against the workmen and remitted the dispute to that court for re-adjudication. The employer appealed. The Court of Appeal, having dismissed the employer's appeal, substituted the consequential order made by the High Court by substituting it with an order directing reinstatement. Section 69(4) of the Courts of Judicature Act 1964 was relied on to effect the variation. Attention was called to the similarity in language between the section and the first limb of r 33 of O 41 of the Indian Civil Procedure Code 1908. The latter provision is in the following terms:

> The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

We would additionally point out the likeness in phraseology between the second limb of the Indian provision and sub-r (5) of r 51 of the Rules of the Supreme Court 1980 as well as s 69(5) of the Courts of Judicature Act 1964.

In *Harris*, the Court of Appeal, after a discussion of the relevant Indian cases, held that it had the power (at p 520):

> ... in a proper case [to] make consequential orders even after dismissing an appeal in order to achieve complete justice.

We accept this as an accurate statement of the law and as being applicable to this court in respect of those appeals falling within the proviso to r 138 of the Rules of the Federal Court 1995.

Having decided that this court has the jurisdiction and the power to grant relief to the respondent, all that remained was to determine the nature of the relief that ought to be granted. The principles that govern the relief that is to be awarded in cases of this nature are sufficiently set out in Malhotra's *The Law of Industrial Disputes* (4th Ed) Vol 2 at p 942:

> From the decided cases, no hard and fast rule of universal application is discernible as to which circumstances would, in a given case, constitute an exception to the general rule of reinstatement. The Labour Appellate Tribunal in *Buckingham and Carnatic Mills*' case [1951] 2 LLJ 314 stated that 'the past record of the employee, the nature of his alleged present lapse and the ground on which the order of management is set aside' are some of the relevant factors for consideration. The conduct of the workman is also a vital factor to be taken into account by the tribunal before ordering reinstatement. In this connection, expressing himself in rather vehement language, a single judge of the Calcutta High Court said, 'supposing the tribunal comes to the conclusion that the employee is a rogue or a black guard or a thoroughly incompetent one, unable to perform his job, it is ridiculous to suggest that such matters are irrelevant and the tribunals must still reinstate the worker and shut their eyes to the real state of things' (see *Hukumchand Jute Mills Ltd v Labour Appellate Tribunal* [1959] 1 LLJ 595). Trustworthiness of the worker is one of the important factors to be taken

into account. The nature of the relations between the employer and the employee is also a relevant factor to be taken into consideration. The tribunal is also to safeguard the interests of the employer including the consideration of discipline in the establishment. *The nature of the duties performed by the employee and the nature of the industrial establishment employing him is also a relevant consideration.* These cases are merely illustrative where an exception to the general rule of reinstatement is to be made. No comprehensive rule as to which circumstances would in a given case constitute an exception to the general rule can possibly be laid down. In each case, keeping the objectives of industrial adjudication in mind, and in a spirit of fairness and justice, the tribunal has to deal with the question whether the circumstances of the case require that an exception should be made and compensation would meet the ends of justice. If, on taking these principles and the relevant factors into consideration, the tribunal comes to the conclusion that reinstatement would not be desirable or expedient in the circumstances of the case, it may award compensation instead of reinstatement to the workman in spite of the fact that his discharge or dismissal was invalid owing to some infirmity in the impugned order. (Emphasis added.)

Taking into account all relevant circumstances, including the fact that the respondent in the instant appeal performed an executive function in a recreational club, we came to the conclusion that reinstatement is not the appropriate remedy. Further, we were informed by Mr Sivabalah that the ownership of the club had changed hands. In these circumstances it would, in our judgment, be unjust to compel the new management to employ the respondent.

Upon the quantum of compensation that should be awarded to the respondent, there was no quarrel between counsel. Neither the multiplier nor the multiplicand was in doubt. It was common ground, based on the undisputed evidence on the record, that the last drawn salary of the respondent was RM4,575 per month with contributions to the Employees' Provident Fund ('EPF'). Counsel on both sides agreed that the period for which the salary ought to have been paid was three years. Accordingly, we awarded the respondent RM151,997, ie RM4,575 x 36 months. In addition, we directed the payment of the necessary EPF contributions. We also ordered that this sum was to be paid within two months from 28 August 1996, being the date on which we heard and disposed of the appeal.

For these reasons, the appeal was dismissed. The orders of the High Court were affirmed save to the extent that the order remitting the dispute to the Industrial Court was varied to the extent that the appellant was ordered to pay the respondent the aforementioned compensation in lieu of reinstatement. The appellant was also directed to pay the costs of this appeal. The deposit paid into court by the appellant was ordered to be paid out to the respondent to account of his taxed costs.

Appeal dismissed.

Reported by Kenneth Goh